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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
| Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers | ) | CC Docket No. 97-146 |

# COMMENTS OF THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE, THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, ABB BUSINESS SERVICES, INC. AND THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

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Dated: August 18, 1997

## SUMMARY

The continued application of tariff filing requirements to interstate exchange access services furnished by competitive access providers ("CAPs") and competitive local exchange carriers ("CLECs") does not serve the Commission's goal (and Congress' intent, as embodied in the Telecommunications Act of 1996) of fostering competition for interstate exchange access services. The Commission has repeatedly sought a lawful means to de-tariff the services of non-dominant carriers and, in the Telecommunications Act of 1996, Congress handed the Commission the statutory tool needed to do the job.

De-tariffing customer-specific service arrangements will encourage fair dealing and foster competition in the market for interstate exchange access services. Only mandatory de-tariffing -- and the resulting elimination of the filed rate doctrine -- will put a well-deserved end to the carriers' practice of attempting to use tariffs to nullify contractual arrangements. The Commission's interest in monitoring non-dominant carriers' compliance with geographic rate averaging and rate integration obligations can be accomplished without mandatory tariff filings or requiring that all rates be available for public inspection.

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The Ad Hoc Telecommunications Users Committee, The California Bankers Clearing House Association, The New York Clearing House Association, ABB Business Services, Inc., and The Prudential Insurance Company of America file these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

The undersigned are large users (and associations of large users) of interstate interexchange telecommunications services. The group, which includes customers of many of the competitive access providers ("CAPs") and competitive local exchange carriers ("CLECs"), strongly supports the

[1] Petition Requesting Forbearance of Hyberion Telecommunications, Inc., from CCB/CPD No. 96-3; Petition for Forbearance of Time Warner Communications, from CCB/CPD No. 96-7; *Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice Of Proposed Rulemaking (June 19, 1997).

Commission's tentative conclusion in the NPRM that complete detariffing of interstate exchange access services provided by these carriers is in the public interest.[2] The continued application of the tariff filing requirement to such services does not serve the Commission's interest (and Congressional intent as embodied in the Telecommunications Act of 1996) of fostering competition for interstate exchange access services. As set forth below, there are ways to monitor compliance with the statutory geographic rate averaging and rate integration requirements that do not involve mandatory tariff filings or requiring that all rates be available for public inspection.

## ARGUMENT

### I. THE COMMISSION HAS STATUTORY AUTHORITY TO ORDER MANDATORY DE-TARIFFING WHERE THE SPECIFIED CONDITIONS ARE MET.

More than a decade ago, the Commission found that permitting non-dominant carriers to offer interexchange services on a non-tariffed basis would further the primary goal of the regulatory scheme set forth in the Communications Act of 1934, *i.e.*, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. In particular, the Commission found that "there was no evidence" that tariff filings were necessary to prevent non-dominant

[2] See NPRM at ¶ 34. The group agrees that because Incumbent Local Exchange Carriers ("ILECs") are still the overwhelmingly dominant providers of interstate exchange access services, those carriers should not be relieved of their tariff filing requirements until the advent of real competition.

common carriers from charging unjust and unreasonable rates or unlawfully refusing to make their services available.[3] As the Commission later explained, the core requirements of Title II of the Act -- just and reasonable rates -- "could be effectuated for certain carriers . . . through market forces and the administration of the complaint process."[4] The Commission has reiterated this determination in the instant NPRM, noting that "tariffing is not necessary to assure reasonable rates for carriers that lack market power . . . marketplace forces will preclude non-ILECs from charging unreasonable rates for interstate exchange access." NPRM at ¶ 23.[5]

The Commission has also long recognized that tariff filings by non-dominant carriers can, in fact, frustrate achievement of the policy goals entrusted to the agency by Congress. Most recently, in the *IXC Forbearance Order*, the Commission determined that the tariff-filing requirements applicable to non-

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[3] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C. 2d 554, 578 (1983), *vacated, AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied sub nom. MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993) ("*Competitive Carrier*"). *See also Competitive Carrier*, First Report and Order, 85 F.C.C. 2d 1, 31 (1980) ("[F]irms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act.")

[4] *Competitive Carrier*, Sixth Report and Order, 99 F.C.C. 2d 1020, 1029, n.33 (1985), *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[5] The Commission has previously determined that CAPs and CLECs are non-dominant carriers. *See Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6756-57 (1993), *vacated on other grounds Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995)(determining that *CAPs* are non-dominant) and *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997)(finding that competitive LECs do not appear to possess market power and that the imposition of regulatory requirements with respect to competitive LEC terminating access is unnecessary).

dominant interexchange carriers undermined the development of vigorous competition by stifling service and marketing innovations and facilitating price coordination among competing carriers.[6]

The Commission has not wavered in these views in the intervening years and has consistently sought a lawful means to implement that policy. In the Telecommunications Act of 1996, Congress has handed the Commission the statutory tool it needed to do the job. Section 401 of the Telecommunications Act of 1996 added a new Section 10(a) to the Communications Act that requires the Commission to forbear from applying regulatory or statutory requirements to telecommunications carriers or particular telecommunications services, or to a "class of telecommunications carriers or telecommunications services," if the Commission determines that (1) their enforcement is not necessary to ensure compliance with the Act's core requirements, (2) enforcement is not necessary to protect consumers, and (3) forbearance is consistent with the public interest.[7]

Based on an analysis of the factors enumerated in Section 10(a) of the Act, the Commission has (correctly) proposed to implement forbearance on a mandatory basis for the interstate exchange access services of non-ILEC providers of interstate exchange access services. See NPRM at ¶¶ 23-29.

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[6] See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (released October 31, 1996) (hereinafter "*IXC Forbearance Order*"), *stay pending appeal MCI Telecommunications Corporation and America's Carriers Telecommunications Association v. Federal Communications Commission, et.al.*, United States Court of Appeals for the District of Columbia Circuit, Case No. 96-1459.

[7] 47 U.S.C. Section 160.

Contrary to the arguments raised by some of the participants in the *IXC Forbearance* proceeding, the plain meaning of the term "forbearance" does *not* preclude mandatory, as opposed to permissive, detariffing. The "bible" of the English language, the Oxford English Dictionary, includes nine definitions for the meaning of the term "forbear," including "to cease, desist from," in its active as well as passive sense.[8]

Thus, the arguments that the "dictionary definition" of the term forbear precludes mandatory, as opposed to permissive, is incorrect. It is far more instructive to look at the how the Commission has used the word "forbear" and similar terms to refer to mandatory, as well as permissive, de-tariffing over the course of the past decade.[9] That was the context in which Congress adopted Section 10(a) of the Act, and it is within that regulatory and historical context that the statute should be construed.

Equally relevant are decisions by federal agencies and the courts that have construed similar statutory language to authorize agencies to prohibit the filing of rate schedules by regulated entities. For example, a 1993 amendment to the Communications Act gave the Commission authority to "specify by

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[8] Oxford English Dictionary at 618 (2nd Ed.1989). Illustrating this meaning, the authors cite De Foe's *Plague* (1756): "[a]ll public assemblies at other Burials are to be forborn during the Continuance of the Visitation." The plain meaning of this sentence is that public assemblies during the plague were prohibited -- it was not left to citizens to decide, within their own discretion, whether or not to hold such meetings.

[9] *See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Sixth Report and Order, 99 F.C.C. 2d 1020, 1027 (1985) (ordering "cancellation of forborne carrier tariffs"); *Implementation of Sections 3(n) and 332 of the Communications Act,* Second Report and Order, 9 FCC Rcd 1411, 1480 (1994) ("*CMRS Order*") ("[W]e will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers.").

regulation [provisions of Title II] as inapplicable to [commercial mobile radio services]."[10] Based on this authority, the Commission adopted a mandatory detariffing regime.[11]

Earlier, the Civil Aeronautics Board (CAB) adopted a mandatory deregulatory regime based on a 1978 amendment to the Federal Aviation Act that gave the CAB authority "to exempt from the requirements of this title . . . any person or class of person if it finds that such exemption is consistent with the public interest."[12] The mandatory deregulation was appealed on the theory that under the Federal Aviation Act, the CAB's "authority to exempt airlines from certain requirements cannot be used to prohibit airlines from filing [inter-carrier] agreements . . . if they choose to do so."[13] The D.C. Circuit Court flatly rejected that contention, describing the agency's exemption authority as "broad" and noting that the CAB's refusal to permit filing of inter-carrier agreements was consistent with Congress's deregulatory purpose[14]. The claims rejected by the

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[10] 47 U.S.C. § 332(c)(1)(A).

[11] The Commission specifically read the authority granted by the statute -- which it described as "forbearance authority" -- as encompassing both permissive and mandatory detariffing. *CMRS Order*, 9 FCC Rcd at 1475.

[12] *Airline Deregulation Act of 1978*, Pub. L. No. 95-504, 92 Stat. 1705, 1731-32 (Oct. 24, 1978).

[13] *National Small Shipments Traffic Conference, Inc. v. CAB*, 618 F.2d 819, 835 (D.C. Cir. 1980).

[14] Id.

D.C. Circuit are virtually identical to various carriers' arguments in support of their permissive detarrifing arguments[15].

In the *IXC Forbearance Order*, the Commission took note of these decisions in determining the bounds of its own forbearance authority.[16] It recognized that if the argument that "forbearance from applying" a requirement cannot mean the preclusion of voluntary compliance were correct, then each of these statutes should also have been deemed to authorize only permissive deregulation. Yet the implementing agencies and this Court read them as conferring authority to adopt mandatory deregulation. The similarity in the language used in all of these statutes -- that the agency has the authority to

- exempt certain entities from a requirement
- specify that a requirement is not applicable
- forbear from applying a requirement

strongly supports the Commission's authority to require mandatory detariffing for interstate exchange access services provided by non-ILECs.

The Commission's forbearance authority is broad, its proposal is entirely consistent with the deregulatory thrust of the Telecommunications Act of 1996, and nothing in the Communications Act gives carriers the right to file tariffs with the Commission in order to secure the anomalous and unreasonable "rights" conferred by the filed rate doctrine, as discussed below.

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15 Id.

16 *See IXC Forbearance Order* at ¶ 74.

## II. DE-TARIFFING CUSTOMER-SPECIFIC SERVICE ARRANGEMENTS WILL ENCOURAGE FAIR DEALING AND FOSTER COMPETITION.

The undersigned wholeheartedly agree with the Commission's tentative conclusions in the NPRM that mandatory detariffing of interstate exchange access services would produce many benefits for consumers of interstate exchange access services, including:

- "permitting rapid response to market conditions through elimination of costs on carriers that attempt to make new offerings,"
- "facilitating entry by new providers," and
- precluding carriers from "attempting to use the filed rate doctrine to nullify contractual arrangements," and removing "uncertainty about the application of the doctrine to tariffed arrangements that are filed on a permissive basis."

NPRM at ¶ 34.

The arguments raised in the comments and reply comments filed by the undersigned in support of the Commission's proposal to implement mandatory detariffing of interexchange services apply with equal force to the Commission's proposal to implement forbearance for interstate exchange access services in this case.[17] Most notably, mandatory de-tariffing is likely to produce an

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[17] *See* Comments of The Ad Hoc Telecommunications Users Committee, The California Bankers Clearing House Association, The New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America to the NPRM in CC Docket No.96-61 (filed April 25, 1996) (hereinafter "Ad Hoc Comments"); Reply Comments of the Comments of The Ad Hoc Telecommunications Users Committee, The California Bankers Clearing House Association, The New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America (filed May 24, 1996) (hereinafter "Ad Hoc Reply Comments").

immediate and important benefit to customers of individually negotiated service arrangements -- parity with the carriers in terms of the enforceability of their service contracts. Under the current regulatory regime, non-dominant carriers are effectively free to abrogate long-term contracts by filing changes to the applicable tariffs without specifically informing their customers, and on abbreviated or non-existent general public notice of any kind. Because the carriers are unlikely to bestow these benefits voluntarily, any de-tariffing policy adopted by the Commission should be mandatory, *not* permissive.[18]

## III. THE COMMISSION'S INTEREST IN MONITORING COMPLIANCE WITH THE GEOGRAPHIC RATE AVERAGING AND RATE INTEGRATION REQUIREMENTS OF THE ACT CAN BE ACCOMPLISHED SHORT OF A BROAD PUBLIC DISCLOSURE REQUIREMENT.

In the NPRM, the Commission seeks comment on whether non-ILEC providers of interstate exchange access services subject to a tariff forbearance requirement should be required to "make rates available to the Commission and to interested persons upon request." NPRM at ¶ 34. The Commission notes that in the *IXC Forbearance Order* an interexchange carrier subject to mandatory forbearance was required to make available to the public information concerning its current rates, terms and conditions for detariffed services to determine whether the carrier was adhering to the geographic rate averaging and rate

[18] In our experience, carriers subject to tariff filing requirements have (1) devised vehicles for their customer-specific service arrangements that rely upon this regime to the disadvantage of their customers, and (2) jealously guarded their right to amend those generic tariffs without first securing the consent of (or even giving notice to) their contract tariff customers who may be affected by the changes. *See* Ad Hoc Comments at p. 5-10; Ad Hoc Reply Comments at p. 8-12.

integration requirements of Section 254(g). *Id.* at n. 85.[19] As set forth below, the Commission's interest in ensuring whether a carrier is adhering to these requirements can be successfully accomplished short of the unnecessary (and anti-competitive) public disclosure requirement adopted in the *IXC Forbearance Order*.[20]

The Commission's goal of ensuring rate integration can be adequately met by a combination of the following:

- the Commission's complaint processes;
- a requirement that customer-specific rates be made available by carriers to Commission Staff and complainants in formal proceedings
- a requirement that customer-specific rates be made available to Members of Congress and their staffs in connection with agency oversight; and
- a requirement that customer-specific rates be made available to state officials (*e.g.*, public utility commissions and attorneys general) acting in their official capacities.

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[19] The undersigned organizations have petitioned for reconsideration of the public disclosure requirements of the Commission's IXC Forberance Order. *See* Petition for Clarification and Partial Reconsideration of the Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America to the Report and Order in CC Docket 96-61 (filed Dec. 23, 1996) (hereinafter "Petition").

[20] As previously noted by the undersigned organizations, a rate disclosure requirement can not be justified on grounds relating to enforcement of Section 254(g) because the Commission has forborne from applying Section 254(g) with respect to contract tariffs and Tariff 12 offerings. Petition at 9; Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, The Ad Hoc Telecommunications Users Committee, The California Bankers Clearing House Association, The New York Clearing House Association, ABB Business Services, Inc. and The Prudential Insurance Company of America Reply to "Petition" at pg. 4-5 (filed February 7, 1997).

Mechanisms of this kind have been successfully used in other contexts, for example, in monitoring compliance with the Commission's slamming rules by requiring that carriers maintain records of letters of authorization ("LOAs") and release them upon request in the event of a dispute.[21]

If, to ensure compliance with rate integration requirements, the Commission determines that public disclosure is necessary, such disclosure can (and should) be limited to:

- disclosure of contract rates that are distance sensitive;
- disclosure of mileage bands in a contract, but not the actual rates;
- disclosure of the ratio of a contract's pricing in the highest mileage band to its pricing in lower mileage bands.[22]

It is not our intention to deprive customers or the States or the Commission of the ability to enforce rights under the Act or the Commission's orders. However, we believe that a broad public disclosure requirement would undermine a key objective of mandatory detariffing, create its own set of serious

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[21] 47 C.F.R. Sections 64.1100, 64.1150.

[22] Public disclosure of more than the items set forth herein would not be in the public interest. Carrier contracts with large customers often address matters that are not disclosed in the tariffs filed by the carriers – staffing requirements, customized billing requirements, network management functionality, customer security requirements, *etc.* A contract disclosure requirement would, therefore, sweep more broadly than Section 203 of the Act and would be needlessly invasive of the proprietary interests of the parties to those contracts – customers as well as carriers.

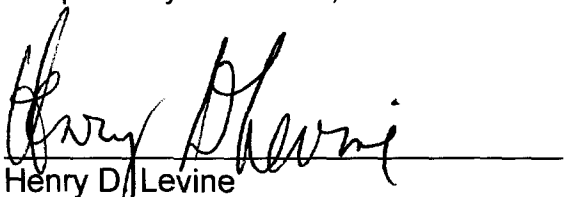
problems, and most importantly, do little or nothing to advance the public interest.

As previously discussed, one of the key benefits of mandatory de-tariffing is that it will limit the ability of competing carriers to share price information with one another. Any requirement that contracts be made public would re-establish, with official government blessing, a regime that facilitates the sharing of price information and allows carriers to signal changes in prices and terms to each other. This behavior is highly anti-competitive, and should not be fostered by regulatory requirements concerning disclosure of tariffs, contracts or otherwise.

## CONCLUSION

For the reasons stated above, the Commission should adopt mandatory de-tariffing of interstate exchange access services for non-ILEC providers of those services and should not require public disclosure of the rates, terms and conditions of customer-specific arrangements for those services.

Respectfully submitted,



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August 18, 1997
200.04/Forbear/COM CLEC detariffing

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## CONCLUSION

For the reasons stated above, the Commission should adopt mandatory de-tariffing of interstate exchange access services for non-ILEC providers of those services and should not require public disclosure of the rates, terms and conditions of customer-specific arrangements for those services.

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August 18, 1997

Certificate of Service

I, Dave Raksin, hereby certify that on this 18th day of August 1997, true and correct copies of the Comments of the Ad Hoc Telecommunications Users Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and the Prudential Insurance Company of America in the matter of Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, CC Docket No. 97-146, were served by hand delivery upon the following parties:

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